REA LAW JOURNAL

DEPARTMENT OF AGRICULTURE RURAL ELECTRIFICATION ADMINISTRATION

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LEGALITY OF USING POSTAL CARDS TO BILL CONSUMERS

Recently, the REA Legal Division has received several requests for opinions concerning the legality of using postal cards in order to send monthly bills to consumers for power and light used. The question has arisen as a result of the existence of a federal statute which makes non-mailable any postal card containing matter of an "indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character". The Post Office Department has had occasion to issue a circular interpreting the provisions of the statute. This circular, which includes the statute already referred to, is as follows:

"Dunning Postal Cards"

"In view of complaints received by the Department respecting the use of postal cards importuning the payment of debts, the attention of all postmasters and others is called to the provisions of Section 599, Postal Laws and Regulations, 1932 (Section 212, Criminal Code, March 4, 1909; 18 U. S. Code 335).

> All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

"The Department has ruled that the clause of this section prohibiting delineations, epithets, terms, or language * * * calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, covers and makes unmailable cards by which it appears that the addressee is being dunned to effect payment of an account in such manner as to reflect upon the debtor for his failure to pay. This does not include cards that bear respectful requests for the settlement of accounts, or that give notice when an account, paper, assessment, taxes, gas bills, etc., will be due, and such cards are regarded as mailable. The provisions of this section against matter of a 'threatening character' is held by the Department to cover and make unmailable cards that threaten the bringing of suits or legal proceeding if debts, accounts, etc., are not paid. This does not include cards that bear notice of assessments of fraternal and other societies which contain a respectful reference to the rules

of such order or society that failure to pay such assessment will cause the member to be suspended or that his certificate will become void, if the assessment referred, to does not appear to be past due."

In connection with this circular and the statute the following should be noted:

1. Neither the statute nor the interpretation prohibits the use of postal cards for the purpose of sending bills.

2. The prohibition is obviously directed against dunning of debtors and not against informing them that a bill is due. Consequently, postal cards may be used to inform a consumer that a bill is due but a card may not be used if action of any type is to be taken against a debtor because a bill has not been paid.

3. In keeping with the spirit and terms of the statute and interpretation thereof, postal cards should be used only for the original statement that a bill is due or is about to become due. Subsequent statements to the effect that the bill has not been paid with requests for payment and the calling of attention to applicable provisions of the bylaws should be sent by matter under cover rather than through the medium of postal cards.

(continued on page 40)

RECENT CASES

Franchises - Necessity of a referendum on a franchise for two different purposes.

Plaintiffs, as taxpayers, bring this action against the City of Spokane to enjoin the holding of a referendum on a certain proposed ordinance approved by the Mayor and the City Council. Other taxpayers intervened, seeking judgment that the ordinance was void as contrary to the City Charter. The ordinance in question granted to a subsidiary of the Washington Power Co. a franchise to use the city streets to construct and maintain a heating system and an electric system. The City Charter provided that all franchise ordinances, except as otherwise provided by state law, shall be subject to referendum. The Power Company contended that this franchise was not subject to referendum since, under the state law, the Mayor and City Council had exclusive power to grant electric franchises, and that the provision for heating in the present franchise was only a very small and incidental part of the grant.

The City contended that the franchise ordinance was subject to referendum since it did not deal exclusively with a grant for electricity purposes. The intervenors maintained that the ordinance was void under the City Charter as containing two incongruous subjects. Held, the ordinance is void because it contained two incongruous subjects. Washington Power Co. v. Rooney, 101 P.(2d) 580 (Wash., April 26, 1940).

The court assumed that an ordinance granting an exclusive electric franchise is not subject to referendum under the state law. However, the ordinance in question deals with heating as well as with electricity, thus containing both referable and non-referable matters. The voters could not be deprived of their right to a referendum by the coupling of referable and non-referable matters in one ordinance, and it makes no difference that the non-referable matter is of greater financial importance. The court did not answer the question propounded by itself, whether such a coupling made referable the otherwise non-referable matter, since it held that the ordinance contained incongruous subject-matter in violation of the City Charter -- and the test of incongruity in this case was a legal rather than a physical one: the fact that part of the ordinance was referable, and part was not.

Commission Jurisdiction - Jurisdiction of Arkansas Department of Public Utilities over extensions by municipality outside the city.

An Arkansas municipality applied for a permit from the Department of Public Utilities to engage in a light and power business outside the corporate limits of the city. The Department denied the

application. Thereafter, despite the denial, the municipality began to construct the line to service the territory outside its limits. The plaintiff company sought an injunction to prevent the extension. Held, injunction granted. Arkansas Utilities Co. v. Paragould, Ark. Sup. Ct. (June 17, 1940).

The ruling of the court is as follows: "The question presented by this appeal is one of law, and that is whether the City, under the facts stated, may, without the approval of the Department of Public Utilities, construct, operate and maintain an electric distribution system outside the city limits and furnish current for light and power to customers in a community outside the city already served by a private utility operating under a permit from said Department. We think it may not do so, and that the question is controlled by statute. (Sec. 2108 of Pope's Digest) . . . It is argued that the City has a surplus of electrical energy over its needs and that it ought to have the right to dispose of such surplus. It may do so in either the method provided by statute, or by delivering it to a purchaser at the corporate limits without regard to said statute. But when it seeks to engage in the utility business outside its corporate limits, it must get the consent of the Department as provided by statute. It evidently thought so too at the time it applied for a permit to serve the Center Hill community."

Municipal Corporations - Requirement that municipality obtain a certificate of convenience and necessity prior to the construction of a municipal hydroelectric plant.

A municipality sought to construct a municipal hydroelectric plant without first obtaining approval of the N. C. Public Utilities Commission. Held, under the facts presented (see quotation from opinion, infra) approval was required. McGuinn v. High Point, 8 S.E.(2d) 462 (N. C. 1940).

The court states: "The question that remains is whether the City of High Point can lawfully proceed with the undertaking without first obtaining a certificate of public convenience and necessity from the Public Utilities Commissioner of the State of North Carolina. The trial court answered in the negative and we approve. It is provided by the Revenue Bond Act of 1938 (ratified 13 August, 1938) that no municipality (proceeding under this Act) shall construct any gas or electric system without first having obtained a certificate of convenience and necessity from the Public Utilities Commission, 'except that this requirement for a certificate of convenience and necessity shall not apply to any such undertaking defined in this proviso which has been authorized, or the bonds for which have been authorized, by any general, special or local law heretofore enacted'. Section 9. It is the position of the defendants that they come within the exception of the proviso, above quoted, because the undertaking here challenged was authorized by the resolution of the Council of the City of High Point on April 27, 1938, which was more than three months prior to the ratification of the Revenue Bond Act of 1938. Conceding some attenuate ground for the contention, it is not believed that the defendants would want to risk the success of their undertaking alone upon the resolution of April 27, 1938. They deemed it 'advisable to amend and supplement said resolution' by the resolutions of March 20, 1939, which have been regarded as essential to the project. Indeed, these later resolutions apparently wrought substantial changes in the enterprise. It is not thought that the exception to the proviso in the statute was intended to cover a situation similar to the one here presented. The reason for the requirement, as well as the applicable rule of strict construction, Piedmont & Northern Ry. Co. v. United States, D. C., 30 F.(2d) 421, would seem to suggest a contrary intent on the part of the lawmaking body. In this respect we agree with the ruling of the trial court."

APPLICABILITY OF THE HATCH ACT TO ATTORNEYS AND EMPLOYEES OF REA CO-OPERATIVE BORROWERS

The REA Legal Division has received several requests for opinions as to the application of the Hatch Act to employees of REA co-operative borrowers. Although we cannot give an authoritative opinion, we regard the following opinion as sound and within rulings already made by the Attorney General:

Employees of our borrowers are not subject to the provisions of Section 9 of the Hatch Act prohibiting political activity on the part of Federal employees, since they are not employees of the Federal Government. The Attorney General has already ruled that attorneys, appraisers and others employed by the Reconstruction Finance Corporation and Home Owners' Loan Corporation on a fee basis and without the requirement of an oath of office are not subject to the Hatch Act. This ruling reads as follows:

"Section 9 of the Hatch Act has been construed as not applying to the following:

4. Persons who are retained from time to time to perform special services on a fee basis and who take no oath of office, such as fee attorneys, inspectors, appraisers, and management brokers for the Home Owners' Loan Corporation and special fee attorneys for the Reconstruction Finance Corporation." /Circular No. 3301, Office of the Att'y Gen. (October 26, 1939)/

This opinion, of course, applies with even greater force to the employees of our borrowers since they do not represent the Government and upon occasion might even deal at arm's length with the Government.

We are also of the opinion that employees of our borrowers are not subject to the provisions of Section 12 of the Hatch Act prohibiting political activity by employees of states or political subdivisions or abencies thereof. Our cooperative borrowers are private corporations and not public agencies and would seem to be excluded by the express definition of state agencies contained in Section 12(f) of the statute.

Entirely apart from requirements of law, it is obviously undesirable that any officers or employees of REA borrowers should engage in any type of political activity that would be adverse to the best interests of the enterprise which they represent. Such persons should be careful not to use their connection with an REA cooperative either directly or indirectly as an aid to political activity, and so long as they continue to hold such office or employment, should be careful in other respects to take no action inconsistent with such position of trust.

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Address suggestions and contributions to the Editorial Office, REA, Room 206, 1518 "K" Street, Washington, D. C.

LEGAL MEMORANDA RECEIVED IN AUGUST

A-336 Tennessee Cooperative qualifying in Georgia under Model Act

A-338 Oklahoma Cooperative qualifying to do business in Kansas

A-340 Assignability of franchise to use streets in Missouri

A-342 Construction and lease of electric lines by Cooperative in Arkansas

(continued from page 37)

Thus far the discussion of this problem has been confined to a legal analysis. However, observance of the recommendations of the Division of Engineering and Operations will eliminate any problem. The following appears in Supp. #1 to Operations Memo. #53, "Meter Reading, Billing and Collecting" (Aug. 15, 1940):

"Post card bills, when properly prepared on double post cards, retain all the advantages of other billing mediums, and offer great savings in postage and materials. Courtesy to the consumer suggests that bills be covered. Double post cards, properly sealed, fill this requirement, and usually accomplish a saving of from one to two cents per consumer per month in postage alone over envelope mailing, eliminate the envelope, and sometimes one extra addressing operation."

The Legal Division welcomes the following attorneys to the staff:

William L. Anderson

Ohio State University; Managing Editor of the Ohio State University Law Review (1940). Mr. Anderson will be in the Opinion Unit.

Southgate L. Morison

Harvard Law School (1929); member of the Board of Student Advisers in charge of the Ames Competition. General practice of law in Baltimore; member of the firm of Ritchie, Janney, Ober & Williams. Mr. Morison will be in the Loan Section.

Charles Rembar

Columbia Law School; Managing Editor of the Columbia Law Review (1938); attorney in Reorganization Division of S.E.C. 1938 to 1940. Author of: Claims Against Affiliated Companies in Reorganization (1939), 39 Col. L. Rev. Mr. Rembar will be in the Tax Unit.

Samuel Saltman

Yale Law School; Editorial staff, Yale Law Journal (1932-33); Private practice in Holyoke, Massachusetts; City Solicitor of Holyoke (1939). Mr. Saltman will be in the Loan Section.

Charles Samenow

Yale Law School; Editorial staff, Yale Law Journal (1929); 1929-34 faculty Yale Law School; 1934-36 Attorney in Treasury Department; 1936-39 private practice in New Haven and Bridgeport, Connecticut; 1939-40 Attorney at U.S. Housing Authority; Co-author of: The Summary Judgment, Clark & Samenow, 38 Yale Law Journal. Mr. Samenow will work in the field of legislation.

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Ohio Basic State Law Memo

A-327 Legality of REA's offering prizes for suggestions as to uses of electricity in rural areas

A-328 Right of REA as mortgagee to enjoin the collection of tax on cooperative property - Kentucky

A-329 Power of a state bank to pledge assets as security for private deposits - Georgia

A-330 Use of security deeds instead of mortgages to eliminate necessity of supplemental mortgages - Georgia

A-331 Effect of omission of county name in mortgage acknowledgment - Oklahoma

A-332 Federal employee as trustee under deed of trust securing REA loan

A-333 Legislation affecting rural electrification in Massachusetts

A-333A Vermont cooperative doing business in Massachusetts

A-333B New Hampshire cooperative doing business in Massachusetts

A-334 Suggested amendments to Model Rural Electrification Act

A-335 Right of REA employee to receive compensation for magazine articles about REA

A-337 Authority of REA Administrator to approve sale of lines by South Carolina Authority to cooperatives

A-339 Jurisdictional amount requisite for removal to federal courts

A-341 Laws and regulations pertaining to films made by Department of Agriculture

A-343 Limitations imposed by Rural Electrification Act on borrowers' purchases of land with funds advanced by REA

A-344 REA and Clemson College as joint employers to promote utilization

A-345 The wearing of political buttons as violative of Civil Service Rules and Hatch Act

A-346 Legality of filling vacancies on Board of Directors by action of remaining directors - Illinois

TAX MEMORANDA

T-253 Taxes on S. D. cooperative doing business in Wyoming

T-254 Kansas Use Tax on meters purchased outside the state

T-255 Classification of REA cooperatives for tax purposes in Kansas

T-256 Service tax on engineering fees in Colorado

T-257 Credit on Federal unemployment tax for contributions paid to state

T-258 Survey of tax situation in Virginia

T-259 Tax on conveyance of transmission lines in Alabama

T-260 Obligation to pay taxes, as between vendor and vendee, on electric lines in Michigan

T-261 State Unemployment taxes applicable to REA cooperatives

T-262 Use tax in South Dakota

T-263 Internal Revenue Act of 1940 and REA cooperatives